83-416

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELIZABETH Y. BYRUM, et al.,

Petitioners

v.

LOWE & GORDON, LTD.,

Respondents

and

BARNEY L. BYRUM, et al.,

Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD., et al.,

Respondents

BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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Respondent Lowe & Gordon, Ltd., now Lowe, Gordon, Jacobs & Snook, Ltd., prays that this Court deny the Petition for Writ of Certiorari filed in the above-styled cases, for the following reasons:

1. Petitioners have failed to comply with Rule 21.1(h), in that they have not stated the stage in the proceedings at which the federal questions on which review is sought were first raised.

2. The federal constitutional issues raised in the Petition for Writ of Certiorari were not raised in any lower court in either case, and have never been presented to any other forum.

3. The decisions of the state courts rest on adequate independent state procedural grounds.

4. Petitioners' argument, based upon their assertion that they were not afforded "notice reasonably calculated, under all of the cirumstances . . . to afford them an opportunity to present their objections," ignores their admission in pleadings, found as fact by the Circuit Court of the City of Charlottesville and specifically reaffirmed by the Virginia Supreme Court,

that Petitioners had received a copy of the Motion for Judgment, had filed a response, had actual notice of the Motion for Default and Summary Judgment, and had simply refused to appear.

STATEMENT OF THE CASE

In April, 1974, Petitioners Barney L. Byrum, Jr. and Elizabeth Y. Byrum retained John C. Lowe, now president of Respondent Lowe & Gordon, Ltd., to represent them in two cases. To secure payment of legal fees, the Byrums executed promissory notes and a deed of trust on property owned by them in Louisa County, Virginia. When the Byrums refused to pay the legal fees due, Respondent brought suit. The Virginia Supreme Court described the litigation:

> The Appellee, a professional corporation engaged in the practice of law, originally filed suit against the Byrums in June, 1978, for money it claimed was due it for legal services

rendered. The Byrums, representing themselves, responded to the suit, giving the court an address in Cabin John, Maryland.

In February, 1979, Lowe & Gordon nonsuited the first suit and personally served the Byrums in Charlottesville, Virginia,[1] with a new Motion for Judgment which increased the amount alleged to be due. The Byrums, again proceeding pro se, filed a timely response to this Motion for Judgment. However, this responsive pleading contained no address, in violation of Code §8.01-319.

In May, 1979, Lowe & Gordon filed a Motion for Default and Summary Judgment. It alleged that the Byrums had failed to keep the court and opposing counsel advised of an address where they could be reached and that this made prosecution of the case impossible. A copy of this Motion was sent certified mail to the Byrums' home in Virginia and other copies were served by the Secretary of the Commonwealth at two addresses in Maryland, including the Cabin John address the Byrums had previously given the court.

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[1] By letter of August 24, 1983, Allen L. Lucy, Clerk of the Supreme Court of Virginia, notified counsel that the words "in Charlottesville, Virginia," should be added. This correction came too late for publication by West Publishing Company.

> In May, 1979, the court held that the Byrums were in default and entered judgment for Lowe & Gordon. The court stated that the Byrums' failure to provide an address had prevented the case from proceeding in an orderly manner, that the Byrums had been "given every reasonable opportunity" to appear, and that Lowe & Gordon has "acted entirely reasonably and patiently in attempting to contact" the Byrums. It concluded the Byrums had engaged in "a long, vexatious, dilatory and unreasonable course of conduct."
>
> As no action was taken to modify this judgment within 21 days, it became final. Rule 1:1. Moreover, no appeal was taken from the May judgment in accordance with our Rules of Court.

Elizabeth Y. Byrum v. Lowe & Gordon, Ltd., 224 Va. ___, 302 S.E.2d 46, 47 (1983).

Lowe & Gordon proceeded to execute on the deed of trust, by properly beginning foreclosure proceedings in the Circuit Court for the County of Louisa. The Byrums' property was sold on November 19, 1979. The Byrums then filed a Bill of Complaint in the Circuit Court for the County of Louisa (Barney L. Byrum, Jr. v. Lowe & Gordon, Ltd. (No. 2319)), praying that the Trustee's Sale

be set aside. A temporary injunction was granted by the Circuit Court for Louisa County on December 13, 1979. The Byrums raised many objections to the Trustee's Sale, but the only objection that is even tangentially related to the issues raised in the Petition for Writ of Certiorari is their contention that the Trustee did not give adequate notice to them, and did not use the last known address for the Byrums, as required by Virginia law.

As that litigation progressed in Louisa County Circuit Court, the Byrums returned to Charlottesville Circuit Court and sought to reopen the May, 1979, judgment. The Virginia Supreme Court described the motion as follows:

> In April, 1980, the Byrums, by counsel, filed a "Motion to Vacate Default Judgment Per §8.01-428."
>
> The Byrums admitted that one of the Maryland addresses was the proper place to reach them and that notice of Lowe & Gordon's Motion for Default and Summary Judgment had been received, although a

> family member failed to forward it to them in a timely fashion. The Byrums further admitted that Lowe & Gordon had attempted to contact them by telephone, but they had failed to provide an address because they felt they were being harassed. After a hearing on this Motion, the trial court refused to set aside the May, 1979, judgment, and the Byrums timely appealed from this order.

Elizabeth Y. Byrum v. Lowe & Gordon, Ltd., 302 S.E.2d at 47. The Virginia Supreme Court granted the Petition for Appeal.

As the appeal from the denial of the motion to reopen went forward, so did the litigation of the Louisa County suit. Eventually, the Louisa Circuit Court found that the Trustee "did not fail to give proper notice to plaintiffs of the foreclosure [and] did not fail to use the last known address in accordance with statutory Virginia law." (A-19). This order was entered on June 5, 1981.

On June 24, 1981, the Byrums asked the trial court to vacate and suspend the order dated June 5, 1981. Virginia law requires that an order vacating and

suspending a prior order be entered, not merely sought, within twenty-one days. The court took no action until July 22, 1981, well after the twenty-one day period allowed in Rule of Court 1:1. On August 13, 1981, the trial court sua sponte entered an order granting the Motion to Vacate and Suspend. On October 16, 1981, Petitioners filed a Motion asking that the Court rule that the order of July 22, 1981, was effective nunc pro tunc June 24, 1981. The court denied that motion, by order entered November 10, 1981, effective nunc pro tunc October 16, 1981.

The Byrums filed their Petition for Appeal on November 9, 1981, alleging many defects in the Trustee's Sale. Again, the only appeal issue relevant to their Petition was that the Trustee had failed to send notice to the Bryums' last known address. There was no hint of an allegation that the

statute, either facially or as applied, might violate due process of law.

Meanwhile, the injunction granted December 13, 1979, was continued in effect until the Virginia Supreme Court completed its consideration of the appeal from the judgment of the Circuit Court for the City of Charlottesville.

On April 29, 1983, the Supreme Court of Virginia upheld the Circuit Court for the City of Charlottesville in Elizabeth Y. Byrum v. Lowe & Gordon, Ltd. The Byrums filed a Petition for Rehearing, which was also denied by order dated June 17, 1983. Also on June 17, 1983, the Supreme Court of Virginia denied the Petition for Appeal filed in the Louisa County case, Barney L. Byrum, Jr. v. Lowe & Gordon, Ltd.

In their Petition for Rehearing, Petitioners unwittingly have provided further proof of their "long, vexatious, dilatory and unreasonable course of conduct." Respondent

notes for the Court's benefit that, on November 20, 1981, Petitioners filed yet another lawsuit against Respondent in the Circuit Court for the City of Charlottesville, alleging, inter alia, that Lowe & Gordon, Ltd., John C. Lowe, Gary Patterson (the Trustee), and W. W. Whitlock (counsel for the purchaser at the Trustee's Sale) conspired to defraud Petitioners. They sought actual damages of $60,000.00 and punitive damages of $10,000 000.00. Feeling aggrieved after the Circuit Court permitted Respondents an extension of time in which to file responsive pleadings, and therefore refused to grant the Motion for Summary Judgment filed by Petitioners, Petitioners took an interlocutory appeal to the Virginia Supreme Court, which was dismissed on December 27, 1982. Having thus been returned to the Circuit Court for the City of Charlottesville, the court required

amendments to the Motion for Judgment. The Amended Motion for Judgment, filed with the Petition for Rehearing (pp. 27-31), was dismissed by order dated July 11, 1983.

In their Statement of the Case, Petitioners make many allegations that are not relevant to the narrow issue presented — whether the Virginia statutes, on their face or as applied, denied Petitioners their rights to due process of law under the Fourteenth Amendment to the United States Constitution. Petitioners have repeatedly misstated the facts in their statement of the case, but, inasmuch as those misstatements are not material to the issue before this Court, no point-by-point refutation will be undertaken.

ARGUMENT I

PETITIONERS HAVE FAILED TO COMPLY WITH RULE 21.1(h), IN THAT THEY HAVE NOT STATED THE STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTIONS ON WHICH REVIEW IS SOUGHT WERE FIRST RAISED.

Rule 21.1(h) requires Petitioners to specify, in their Statement of the Case,

> The stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The Statement of the Case does not disclose any mention of the Due Process Clause, the Fourteenth Amendment, or the United States Constitution. As is argued at some length in Argument II, below, Respondent's careful search of the records of

these cases shows only a passing reference to the Due Process Clause, the Fourteenth Amendment, or the United States Constitution in any stage of the proceedings, whether at the trial court or at the state appellate court level. On the chance that Petitioners in fact did raise a federal issue at some point of the proceedings, they have failed to comply with Rule 21.1(h).

ARGUMENT II

THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY PETITIONERS WERE NEVER PRESENTED TO ANY LOWER STATE COURT, AND THEREFORE CANNOT BE RAISED IN THIS COURT.

None of the three "Questions Presented" was raised in any state court under any theory that invoked in any way the Due Process Clause of the Fourteenth Amendment, or any other provision of the United States Constitution.

A careful review of the Motion to

Vacate filed in April, 1980, the Petition for Appeal through the Virginia Supreme Court, and the Appellant's Brief in Elizabeth Y. Byrum v. Lowe & Gordon, Ltd. fails to disclose any mention of any federal question. The Byrums made five assignments of error:

> 1. The trial court erred in not vacating the default judgment and allowing the Appellants to proceed to trial on the merits.
>
> 2. The lower court erred by granting a summary judgment contrary to Rule 3:18.
>
> 3. The lower court erred under Rule 3:17 by finding the Appellants in default.
>
> 4. The lower court erred in sustaining Lowe & Gordon, Ltd.'s alleged violation of §8.01-319 as a basis for granting a Motion for Summary and Default Judgment.
>
> 5. The lower court erred in allowing Lowe & Gordon, Ltd. to utilize §8.01-329 for notice of default and summary judgment to be entered when the Byrums were Virginia residents.

(sic) Appellant's Brief, at 8. The Table of Citations showed fifteen Virginia cases cited; no other authorities were mentioned.

In their reply brief, the only authorities cited were three Virginia cases.

Only in the Petition for Rehearing did the Byrums even refer to the Due Process Clause, to the United States Constitution, or to any federal authority. Petitioners made an argument captioned as follows:

> The Lowe notice utilized under §8.01-329 of the Virginia Code was a legally wrong notice to seek a default summary judgment against Virginia residents.

(Petition for Rehearing, at 15). In the middle of this argument, the Byrums made their only reference to the United States Constitution:

> Does this notice in the use of the long arm statute procedures violate the due process clause of the United States Constitution? It would so seem it does by Mr. Lowe's application of it, when the Byrums were not non-residents that it was used regardless and on all out of state addresses except for ones in Florida. Haynes v. James H. Carr, Inc., 427 F.2d 700 (4th Cir. 1970), cert. denied, 400 U.S. 942, 91 S.Ct. 238, 27 L.Ed.2d 245 (1970).

Petition for Rehearing, at 16.

That is the only time in any of the proceedings in either case when the United States Constitution was mentioned.

First, of course, it is apparent that the Byrums have not attempted to present a constitutional question to a state court. The passing reference in the Petition for Rehearing cannot be adequate to present the issue. If a petitioner seeks to invoke the jurisdiction of this Court, it must be based upon a federal question properly presented and preserved in state courts. Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

If the petitioner intends to rely upon the passing reference to the Due Process Clause in the Petition for Rehearing, this Court has made it clear that the denial of the Petition for Rehearing by the state appellate court, without giving reasons or making clear that the federal question has been considered and overruled, will not be

adequate to invoke the appellate jurisdiction of this Court. St. Louis & S.F.R. Co. v. Shepherd, 240 U.S. 240, 36 S.Ct. 274, 60 L.Ed. 622 (1916).

ARGUMENT III

THE DECISIONS OF THE STATE COURTS REST ON ADEQUATE INDEPENDENT STATE PROCEDURAL GROUNDS.

The case of Elizabeth Y. Byrum v. Lowe & Gordon, Ltd., beginning in the Circuit Court for the City of Charlottesville, was decided on state procedural grounds. This must obviously be the case, since no federal issues were asserted. It cannot even be said that the issues asserted were due process issues clothed in state statutory language. The Virginia Supreme Court's decision was based upon its construction of Va. Code Ann. §8.01-428, and the Court concluded that, since the Byrums had allowed eleven months to

lapse between the entry of the order in May, 1979, and their motion in April, 1980, there was no procedural device by which they could reopen the case. Ultimately, the court concluded that the three ways in which orders may be changed or vacated more than twenty-one days after entry did not apply, as a matter of the construction of the state statute.

This is an independent state procedural ground. Where there is an adequate independent state ground for the decision of the Virginia Supreme Court, Petitioners cannot invoke the appellate jurisdiction of this Court. Cousins v. Wigoda, 419 U.S. 477, 487, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

Likewise, the decision in Barney L. Byrum, Jr. v. Lowe & Gordon, Ltd., from the Louisa County Circuit Court, was certainly based upon state issues. The Petition for

Appeal cited no federal issues; again, the issues raised were not even arguably federal issues. The Virginia Supreme Court did not give any reasons for its decision to deny the Petition for Appeal; however, the denial could have been based upon Petitioners' failure to perfect the appeal within the three months allowed by rule, or the Court may have considered the substantive claims and rejected them on their merits. All of the substantive claims dealt with matters of state statute and procedure concerning the foreclosure sale itself. These are all clearly controlled by state law, and therefore provide an independent basis for decision.

In short, both of the cases being appealed here were brought up as entirely state-law cases. The Virginia Supreme Court decided them as state-law cases. Those decisions of state law are an independent basis for the decisions of the Virginia

Supreme Court, and those decisions are not reviewable by this Court.

ARGUMENT IV

PETITIONERS' ALLEGATIONS THAT THEY WERE DEPRIVED OF DUE PROCESS OF LAW ARE BASELESS.

Petitioners have alleged that they were deprived of due process of law when Respondents set the Charlottesville Circuit Court case for May 24, 1979, and received default and summary judgment at that time. Petitioners cite Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Both Mullane and Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) deal with the adequacy of notice to start legal action; they do not involve questions of the adequacy of notice once the litigation is underway. All that is required under the prior decisions of this Court is that there be a reasonable opportunity for a defendant to receive notice of the pendency of the action. In this case, the Byrums were personally served in the courtroom with the Motion for Judgment on which the judgment was ultimately rendered. They filed their answer. Respondents then attempted to set the case for trial, and were unable to do so, since the Byrums had not given an address on their pleadings and did not respond to mail sent to other known addresses.

In admissions given to the Circuit Court for the City of Charlottesville, the Byrums admitted that Lowe & Gordon had sent them a copy of their Motion for Default and

Summary Judgment in May, 1979. They admitted that the Motion was sent to one of the Maryland addresses that was a proper place to reach them. They admitted that the Notice of the Motion was in fact received by Petitioners' son, who then failed to forward the Notice to them. They further admitted that Lowe & Gordon had attempted to contact them by telephone, but that they had failed to give Lowe & Gordon an address, because they felt that they were being harassed. All of these admissions were found as fact by the Supreme Court of Virginia. This Court should not place itself in the position of reviewing the factual findings of the state courts. Where there has been actual notice, there can be no due process violation.

The Byrums have alleged that they did not receive notice of the Motion for Default and Summary Judgment until May 24, 1979, one day after the hearing was held.

They could have filed an immediate motion for reconsideration; Virginia's courts have typically been very solicitous of pro se litigants, provided they make some effort to comply with court procedures. The Byrums made no such effort.

The cases relied upon by Petitioners are cases in which the civil defendants did not even know that they were being sued. Here, where the Byrums knew that they were being sued but chose to ignore the proceedings, there has been no deprivation of due process. It does not matter whether the procedure for notice is "reasonably calculated to apprise interested parties of the pendency of the action," when the defendant clearly had personal service, effected face-to-face in the Charlottesville courthouse.

CONCLUSION

The Petitioners have been litigating this case in at least three separate actions in two different jurisdictions in Virginia over a period of five years. Having previously raised only issues of state law, they have now brought the matter to this Court, upon frivolous claims of federal questions. As was argued above, these claims are not properly before this Court. Even if they were, however, the claims lack merit.

Respondent Lowe & Gordon, Ltd., now Lowe, Gordon, Jacobs & Snook, Ltd., respectfully prays this Court to deny the Petition for Writ of Certiorari. Respondent also prays this Court to assess costs and attorney's fees against Petitioners, because this Petition for Writ of Certiorari is but one more step in the "long, vexatious, dilatory and unreasonable conduct" identified

by the Circuit Court for the City of Charlottesville back in May, 1979. The Petition for Writ of Certiorari is "frivolous, vexatious, and entirely unmeritorious." Wood v. Santa Barbara Chamber of Commerce, 699 F.2d 484, 485 (9th Cir. 1983); see In re Brose, 51 U.S.L.W. 3898 (June 20, 1983) (Burger, C.J., dissenting).

Supreme Court Rule 49.2 provides that "when an appeal or petition for writ of certiorari is frivolous, the court may award the appellee or the respondent appropriate damages." Among the circumstances leading to the award of damages is the "unsubstantial and frivolous" character of the federal question relied upon. Deming v. Carlisle Packing Company, 226 U.S. 102, 107 33 S.Ct. 80, 57 L.Ed. 140 (1912). Where the petition for writ of certiorari is sought only for delay, a penalty may be imposed. Texas and P. R. Co. v. Volk, 151 U.S. 73, 14 S.Ct. 239, 38 L.Ed. 78 (1894); Southern R. Co. v. Gadd,

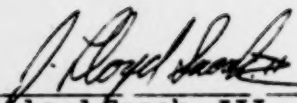
233 U.S. 572, 581, 34 S.Ct. 696, 58 L.Ed. 1099 (1914). In Wagner Electric Manufacturing Company v. Linden, 262 U.S. 226, 233, 43 S.Ct. 589, 67 L.Ed. 961 (1923), this Court awarded damages in a case, similar to the instant case, in which a bill in equity was brought to prevent enforcement of money judgment in a state court. This Court held that the appeal from the district court decision, dismissing for lack of jurisdiction, was frivolous. If this litigation is ever to end, this Court and other courts must be willing to tell those who bring frivolous actions that the further waste of the time of the courts and the parties will no longer be tolerated. These damages may also be taxed against counsel for Petitioners, who has represented them at virtually every step. 28 U.S.C. §1927 (1980).

Respondent respectfully prays this Court to put an end to this litigation, and, by awarding Respondents damages as provided by Rule 49.2, to make clear to Petitioners and their counsel that frivolous appeals will not be tolerated.

Respectfully submitted,

LOWE & GORDON, LTD.

By Counsel



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CERTIFICATE

I, J. Lloyd Snook, III, having been duly sworn, state under oath that I am a member of the Bar of the Supreme Court of the United States, and that forty copies of the Brief in Opposition to Petition for Writ of

Certiorari were mailed, first-class, postage prepaid, addressed to the Clerk of the Supreme Court of the United States, on October 14, 1983, exactly thirty days after receipt of the Petitioner's Petition for Writ of Certiorari. Further, three copies have been mailed to J. Benjamin Dick, 421 Park Street, Charlottesville, Virginia, 22901, counsel for Petitioners.

J. Lloyd Snook, III

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

AT LARGE, to-wit:

Sworn and subscribed before me by J. Lloyd Snook, III, this 14th day of October, 1983.

Notary Public

My commission expires: June 10, 1986